LIBRARY
COURT, U. S.

Supreme Court, U. S.
FILED
JAN 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-695

BOONE DESKINS, - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition For a Writ of Certiorari to the
Kentucky Court of Appeals

MEMORANDUM IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

RICHARD E. VIMONT
P. O. Box 2086
139 Market Street
Lexington, Kentucky 40501
Attorney for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-695

BOONE DESKINS, - - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

MEMORANDUM IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

In its BRIEF FOR RESPONDENT IN OPPOSITION, the Respondent raises for the first time two arguments to which Petitioner addresses this reply, pursuant to Rule 24(4) of the Rules of the Supreme Court.

I.

Respondent contends that this Court lacks jurisdiction under 28 U.S.C. §1257(3) because the Petitioner failed to "raise a federal claim with sufficient definiteness so as to bring such question to the attention

of the state courts." Brief In Opposition, pages 3-4. This assertion is nothing less than an attempt to mislead the Supreme Court of the United States.

One need only read the Opinion Below of the Kentucky Court of Appeals, *Deskins* v. *Commonwealth of Kentucky*, 512 S. W. 2d 520, to ascertain that a federal question was properly raised and ruled upon. We refer the Court to the Opinion Below at 512 S. W. 2d 526, PETITION FOR A WRIT OF CERTIORARI, page 10a, where the Kentucky Court notes:

> "Deskins' third argument again concerns the tapes. Under *Massiah*, supra, *he contends that* since he was represented by counsel at the time the tapes were made, *he was denied his Sixth Amendment right to counsel.*" (Emphasis added.)

Obviously the Kentucky Court was fully cognizant of the federal question before it. The "third argument" to which it refers appeared in the Petitioner's brief to that Court under the following heading:

> "ARGUMENT 3
>
> IT IS PREJUDICIAL ERROR REQUIRING A NEW TRIAL FOR THE COURT TO ALLOW EXTRA-JUDICIAL STATEMENTS OF THE ACCUSED INTO EVIDENCE WHEN SUCH STATEMENTS HAVE BEEN OBTAINED IN VIOLATION OF THE ACCUSED'S RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION," (Brief for Appellant, page 18.)

The Respondent knew that a federal question had been raised since it stated in its brief to the Court below the following:

> "Appellant, citing *Massiah* v. *United States,* 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 199 (1966), contends that due to the fact that he was under indictment for murder and was represented by counsel at the time the tapes were made that he was denied his Sixth Amendment right to counsel." (Brief for Appellee, page 17.)

There can be no doubt that the federal question was sufficiently raised. Regardless of whether there was a proper presentation of the federal question in the Court below, the Kentucky Court of Appeals ruled on the federal question at 512 S. W. 2d 526 (PETITION FOR A WRIT OF CERTIORARI, page 12a):

> "We conclude, as did the trial court, that Deskins was not denied his Sixth Amendment right to counsel."

With due respect to the venerable authority cited by Respondent, we direct the Court's attention to *Raley* v. *Ohio,* 360 U. S. 423 (1959) at page 436, where, upon recognizing its jurisdiction under 28 U.S.C. §1257(3), this Court stated:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. See *Manhatten Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134."

See also *Coleman* v. *Alabama,* 377 U. S. 129, 133 (1963).

II.

As to the Respondent's second contention, that the decision of the Kentucky Court of Appeals from which this review is sought was based upon non-federal grounds, we ask only that the Court look to the relevant portion of the Opinion Below: 512 S. W. 2d at page 526, or pages 10a-12a of the PETITION FOR A WRIT OF CERTIORARI. There, the federal question raised by Petitioner in the Court below, and presented in the PETITION FOR A WRIT OF CERTIORARI was disposed of by the Kentucky Court, holding the federal law embodied in *Massiah* inapplicable and finding support for its opinion exclusively in two decisions of the United States Supreme Court. *Absolutely no state law is even mentioned, much less relied upon to resolve the issue.*

CONCLUSION

Petitioner sincerely regrets the imposition on the valuable time of this Court necessitated by the Respondent's Brief in Opposition. Its arguments are so utterly void of merit as to render it a sham, tendered to obscure rather than to enlighten.

We note, however, that Respondent does not deny the importance and substantiality of the question presented, the need for review being indisputable. Accordingly, we respectfully submit that the Writ of Certiorari should be granted. We further note that Respondent expressly acknowledges, and in effect stipulates, that the Statement of the Case set forth in

the PETITION FOR A WRIT OF CERTIORARI is substantially correct. That being so, the case is squarely within the scope of the *Massiah* rule and indistinguishable from *Beatty* v. *United States,* 389 U. S. 45 (1967). We respectfully suggest that, as in *Beatty,* summary reversal is warranted.

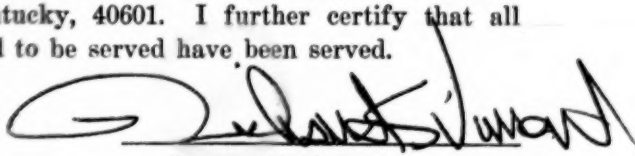
Respectfully submitted,

RICHARD E. VIMONT
P. O. Box 2086
139 Market Street
Lexington, Kentucky 40501

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 1975, three copies of the foregoing Memorandum In Reply To The Brief For Respondent In Opposition were served upon Respondent by depositing same in the United States Mail, postage prepaid, in an envelope addressed to the Honorable Ed W. Hancock, Attorney General and G. Edward James, Special Assistant Attorney General, Capitol Building, Frankfort, Kentucky, 40601. I further certify that all parties required to be served have been served.



RICHARD E. VIMONT
P. O. Box 2086
139 Market Street
Lexington, Kentucky 40501